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No.

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

V.

RONALD PODGURSKI
and
EDWARD J. COLLINS, III,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

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QUESTIONS PRESENTED

1. Whether the decision of the highest court of the Commonwealth affirming the allowance of a motion to suppress evidence in a criminal case constitutes a final judgement under 28 U.S.C. §1257(3)?

2. Whether law enforcement officials may make on-the-street inquires or visual inspection of occupants of a motor vehicle complained of by a private identified citizen, on less than probable cause?

3. Whether threshold inquirey is constitutionally required to be conducted accordingly to a set "order of events" procedure?

4. Whether occupants of a motor van parked upon property under the control of the civilian complainant have a legitimate and reasonable expectation of privacy under the Fourth Amendment when they leave the sliding door of the van open?

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

The Commonwealth prays that a Writ of Certiorari issue to review the judgment of the Supreme Judicial Court of Massachusetts.

OPINIONS BELOW

The opinion of the Supreme Judicial Court is reported at 386 Mass. 385, 436 N.E.2d 150 (1982).

JURISDICTION

The judgment of the Court below was entered on June 2, 1982. (App. A). A petition for rehearing was timely filed on June 9, 1982. (App. B). The petition was denied on June 24, 1982. (App. C). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOKED

AMENDMENT IV

The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Both defendants were charged with possession of a Class C controlled substance with intent to distribute (approximately one pound of hasish), and conspiracy to violate Mass. Gen. Laws, c. 94C, §32. Prior to trial, the defendants moved to suppress certain drugs and paraphernalia found in a van owned by defendant Collins and occupied by both defendants. After hearing, the trial judge allowed the Motion to Suppress. Amended Findings, Rulings and Order on Defendants' Motion to Suppress. (App. D). The Commonwealth's application for leave to appeal pursuant to Mass. R. Crim. P. 15(b)(2) (App. E), was allowed by a single justice of the Supreme Judicial Court. The Full Bench affirmed. Commonwealth v. Podgurski,

386 Mass. 385 (1982). The Commonwealth moved for rehearing alleging, inter alia, that the court had incorrectly found that the van was windowless. In denying rehearing, the court stated that the number of windows would not affect its decision. (App. E).

STATEMENT OF FACTS

At about 3:30 p.m. on the afternoon of September 22, 1980, Paul Wiffen, the manager of the Richard Lewis Clothing Store in Canton Center, observed an unfamiliar blue van in the store's rear parking lot. The parking lot was private, primarily for the use of employees. (Tr. 4). He testified that although it was a very warm day, the van's windows were closed. (Tr. 5). From about fifteen feet away (Tr. 7), Wiffen observed two men in the van, one

of them holding a knife. (Tr. 5-6). Wiffen testified: "It appeared there was somebody cutting up drugs in the back ... What I thought to be drugs." (Tr. 22). The drugs were further described by Wiffen as a brown substance, "a block." (Tr. 8).

Wiffen called the Canton Police and said he was calling from the Richard Lewis store. He testified that he told the dispatcher that there were two individuals in a van in the rear parking lot and that "it was my opinion that they were cutting up some suspicious looking substance." (Tr. 64).

The dispatcher was Officer Robert Esterbrook. He testified that Wiffen identified himself in the call as the store's manager. (Tr. 74). Prior to the call, Officer Esterbrook knew who Wiffen was. (Tr. 74). Esterbrook

testified that in the call Wiffen "said there were to men out in the back, in a blue van, cutting up something they shouldn't have been cutting up." (Tr. 75; 73-74.

Officer James Brown was dispatched to the scene by Esterbrook at 4:03 p.m. (Tr. 73, 78). Officer Brown testified that he observed the blue Chevrolet van behind the Lewis store, and he walked toward it. (Tr. 80). The van had a large sliding side door that was open a foot and a half. (Tr. 80). From ten feet away Brown saw that there were two people inside the rear of the van. (Tr. 81).

He walked up to the van, put his hand against the side, and "stuck my head inside" the open sliding door. (Tr. 82). He observed the two defendants, Podgurski and Collins, and

he knew both men. (Tr. 82). The first thing Officer Brown observed inside the van "was a large knife in the right hand of Mr. Podgurski." (Tr. 82). "[D]irectly in front" of him, on the floor of the van, Brown saw a clear plastic bag containing a brown substance that he believed to be hasish. (Tr. 82, 96-97). He also saw on the van floor a large tan scale between the two men, some clear plastic sandwich bags, a box of envelopes, and a large brown paper bag. (Tr. 83-85). During the course of these observations, the officer asked the occupants, "what was going on." (Tr. 88). Officer Brown picked up the clear bag of suspected hashish and then slid the door open wider. (Tr. 87).

Collins stood up and started getting out throuth the van's side door just as a second officer, Officer Newhouse,

arrived in a cruiser. (Tr. 88). Officer Brown showed the clear bag of hashish to Officer Newhouse, and Newhouse nodded and called Collins over to speak to him. (Tr. 89-90). Podgurski was then ordered out of the van and the two men were placed under arrest for possession of a Class C controlled substance. (Tr. 90, 95).

REASONS FOR GRANTING THE WRIT

1. The instant case presents a serious question concerning the ability of on-the-street law enforcement officials to effectively repond to citizen reports of possible criminal activity.

2. The decision below curtails in an artificial manner an officier's ability to make on-the-street inquiries, whether they be visual or oral, and is

in conflict with Fourth Amendment concepts promulgated by this Court.

3. The decision below far extends the concept of privacy interests protected by the Fourth Amendment to include occupants of a motor vehicle parked on property under the Control of the complainant in a motor van whose sliding door is left open by the occupants.

ARGUUMENT

I. THE DECISION OF THE SUPREME JUDICIAL COURT FALLS WITHIN A RECOGNIZED EXCEPTION TO THE FINALITY REQUIREMENT OF 28 U.S.C. §1257(3).

Under Massachusetts procedure,[1/] an application for interlocatory appeal from an order of the Superior Court

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1/ Mass. R. Crim. P. 15(b)(2), (Appendix E).

determining a motion to suppress may be taken by either the Commonwealth or a defendant. In the instant case, the Commonwealth sought relief from the order of the Superior Court. The application was granted and the appeal referred to the Supreme Judicial Court for hearing. The court affirmed Commonwalth v. Podgurski, 386 Mass. 385, 436 N.E.2d 150 (1982). This decision of the highest court of the Commonwealth falls directly into the third category of exceptions to the finality requirement established in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

> "In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome

> of the case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review." 420 U.S. at 481.

The decision of the court is final and conclusive of the federal issue regardless of the outcome of further proceedings. If the defendant is acquitted, the Commonwealth under both state and federal law is prohibited from appeal. Thus, the instant case presents a stronger example of an exception to the finality rule than California v. Stewart, 384 U.S. 436 (1966), which heretofore has been held to epitomoze this category of cases. In taking jurisdiction in Stewart, this Court stated:

> "After certiorari was granted in this case, respondent moved to dismiss on the ground that there was no final judgment from which the State could appeal since the judgment below directed that he be retried. In the event respondent was successful in obtaining an acquittal on retrial, however, under California law the State would have no appeal. Satisfied that in these circumstances the decision below constituted a final judgment under 28 U.S.C. §1257(3) (1964 ed.), we denied the motion. 383 U.S. 903." 384 U.S. at 498 n.71.

At the time of the Stewart decision only state law prohibited the prosecution from appeal.[2/] However, under Benton v. Maryland, 395 U.S. 784 (1969), federal double jeopardy standards are now applicable to the states and therefore under federal law the prosecution is not permitted to present its federal claim for review.

2/ Palko v. Connecticut, 302 U.S. 319 (1937), was controlling.

The force of this argument has been noted.

> "In this situation the state is not responsible for its inability to appeal after judgment, nor are there any means available to the Court by which it can circumvent the varrier to review after final judgment. An exception to finality could not be definition conflict with the adequate state grounds doctrine. Nor would recognition of such an exception undermine the systematic benefit of the enitre case model; the category would be restricted to a small class of cases and its applicability would be clear and predictable." Note, The Finality Rule for Supreme Court Review of State Orders, 91 Harv. L. Rev. 1004, 1023 (1978).

The decision of the Supreme Judicial Court carries with it a greater degree of finality than the decision of the California court in Stewart. The evidence that the Commonwealth sought to introduce has been finally and

absolutely excluded as being obtained in violation of federal principles; however, in Stewart, the California Supreme Court had "left the State free to show proof of a waiver." 384 U.S. 525 (Harlan, J., dissenting). Further litigation of the federal issue in the instant case, however, is precluded.

Finally, the Commonwealth suggests that a pretrial order suppressing evidence which has been reviewed and conclusively determined by the highest court of the state also falls within the so-called "collateral order" exception established in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).[3/] In Cohen, the Court classified certain judgments as falling into

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3/ The reasoning of Cohen has been applied to criminal cases. Stack v. Boyle, 342 U.S. 1 (1951).

> "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Id., at 546. See also National Socialist Party v. Skokie, 432 U.S. 43 (1977).

In the instant case, the ultimate issue to be determined in the further state court proceeding is the guilt or innocence of the accused. The federal issue presented for review herein is independent of that ultimate issue.

Where a state has provided a procedure for review of a federal issue and a final decision has been rendered on that issue by the highest court of the state, and the party seeking review of that issue in this Court is forever barred by federal and state law from

again raising the claim regardless of the outcome of further state proceedings, this Court should under 28 U.S.C. §1257(3) assume jurisdiction to resolve the claim presented. Cox Broadcasting Corp. v. Cohn, 420 U.S. at 481.

II. THE SUPREME JUDICIAL COURT, HAS INCORRECTLY AND IN CONFLICT WITH APPLICABLE PRINCIPLES DEVELOPED BY THIS COURT, REQUIRED THAT PROBABLE CAUSE BE ESTABLISHED TO JUSTIFY A MINIMAL INTRUSION INTO A MOTOR VEHICLE IN THE COURSE OF AN ON-THE-STREET INVESTIGATION.

A. The Officers Conduct Was Reasonable Under All Of The Circumstances.

The Court below summarily rejected the Commonwealth's theory that the officer's conduct constituted a lawful threshold inquiry, and characterizing the activity as a search, held "[s]ince the search was not supported by full

probable cause, and since it was not conducted according to the standards established for threshold inquiry, it was unlawful. See Commonwealth v. Loughlin, [385 Mass. 60] at 64-65. ..." The Court further emphasized that prior to the officer's intrusion into the van he "made no attempt to question or communicate with the defendants in any way." Commonweatlh v. Podgurski, 386 Mass. 385, 390 (1982).

This holding substantially deviates from the teachings of this court with regard to permissible on-the-street investigations and establishes a totally arbitrary "order of events" standard for threshold inquiries.

This court has acknowledged that a police officer "may, in appropriate circumstances and in an appropriate manner approach a person for purposes of

investigating possible criminal activity, even though there is no probable cause to make an arrest." Terry v. Ohio, 392 U.S. 1, 22 (1968).

The Court has more recently stated,

> "[t]he Fourth Amendment does not require a policeman who lacks probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, Terry recognizes that it may be the essence of good police work to adopt an intermediate response." Adams v. Williams, 407 U.S. 143, 145 (1972).

However, the Court below summarily rejected the proposition that a reasonable basis standard rather than probable cause standard was applicable because the officer's conduct was "so markedly different from that typically seen in 'threshold inquiry' cases. Podgurski, supra at 390. It is submited that the Supreme Judicial Court has

drawn too arbitrary a line demarcating "threshold inquiry." Certainly, there are differences between this and typical Terry "stops." There was no "stop" and there was no "frisk" in this case. There was no forcible detention. Upon an order to investigate suspicious activity, based upon a civilian's complaint that an unknown van was parked in a company parking lot and that the occupants were "cutting up something they shouldn't be,"[4/] the officer approached a van, parked, not on the defendant's private property or on a public street, but in a parking lot

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4/ The fact that the officer was only ordered to investigate suspicious activity and not given the specific information supplied by the civilian complainant does not render his investigation unreasonable, where the dispatching officer was possessed of sufficient factual information to lead to a reasonable suspicion that criminal activity "may be afoot." Cf. Whiteley v. Warden, 401 U.S. 560 (1971).

owned by the store whose manager had made the complaint of suspicious activity. The officer's observations in the lot confirmed the location, description and occupancy of the van, as described by the complainant. Such independent verification provides adequate indicia of the reliability of the complaint to justify further investigation. Adams at 147. The officer, while standing on the property he had been called to, put his head in the open door of the van and looked at the occupants and asked them "what was going on."5/

The Court below placed great

5/ Such a technical "trespass" or intrusion does not render an otherwise reasonable investigation, an unreasonable search. United States v. Johnson, 561 F.2d 836 (D.C. Cir. 1977); United States v. Wheeler, 641 F.2d 1321 (9th Cir. 1981).

emphasis on the fact that the officer made no previous attempt to communicate with the occupants.

> "Prior to entering the van, the officer made no attempt to question or communicate with the defendants in any way ... (Podgurski, at 390.) (See also, Commonwealth v. Loughlin, 385 Mass. 60, 62-63 & n.3)."

However, the Court below cites no requirement of this court which mandates that an inquiry be made prior to and not contemporaneous with a visual inspection. The Supreme Judicial Court's creation of an artificial order of events requirement has no support in Fourth Amendment case law. The import of the court's analysis is that inquiry must proceed any "stop," "frisk" or intrusion. However, this court has approved of "stops", "frisks" and limited intrusions which precede inquiry.

Adams v. Williams, 407 U.S. 143 is on point. There, an informant told a police officer that an individual seated in a nearby vehicle was carrying narcotics and had a gun. The officer approached the vehicle, tapped on the window, asked the occupant to open the door. When he instead rolled down the window, the officer reached through the window and seized a weapon that had not been visible from outside the car. In holding the officer's conduct to be reasonable, the court stated:

> A brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. Id., at 21-22; (citations omitted) (emphasis supplied) Adams, 145-148.

More recently in Michigan v. Summers, 452 U.S. 692 (1981), this court

recognized that limited intrusions are neither confined to momentary on-the-street detentions and frisks as in Terry nor are the investigative techniques employed required to follow a "hard and fast" pattern as the Supreme Judicial Court has held. See Michigan v. Summers at 700-701, n.12.

Whether or not the officier's conduct in making a threshold intrusion into the parked motor vehicle constitutes a "search" for purposes of the Fourth Amendment is a question left open by this court in United States v. Ortiz, 422 U.S. 891, 897, n.3 (1975). It is a question of significant importance to law enforcement and one which should be answered by this court.

It is suggested that a critical inquiry as to whether the officer's conduct constituted an "unreasonable"

search (if indeed it constituted a "search" at all) thus implicating the Fourth Amendment, is one suggested by Professor LaFave, that is, whether the officer conducted himself in a manner consistent with what would be viewed as non-offensive contact if it occurred between ordinary citizens? 3 W. LaFave, Searches and Seizures: A Treatise of the Fourth Amendment §9.2, p.53.

Here, it would be difficult to label it offensive conduct for the store manager to have made the exact same approach to the van parked on property under his control How then does the conduct become unreasonable when an officer has been ordered to investigate a civilian complaint? Moreover, does it not impose a totally unrealistic obligation on police to require them to attempt to converse with persons they

cannot see, or conversely to attempt to talk with persons whom they can see through closed windows, but whom in all liklihood won't be able to hear?

This approach is consistent with Justice Stewart's opinion in United States v. Mendenhall, 446 U.S. 544 (1980) in which it was found that no "seizure" occurred when DEA agents approached an individual on the concourse in an airport and asked questions of her which resulted in her accompanying the agents to their office and consenting to a search. It is suggested that when the officer put his head in the open door of the van and asked what was going on, no "seizure" had occurred. The court's analysis in Mendenhall is instructive.

> We adhere to the view that a person is "seized"

only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." United States v. Martinez-Fuerto, 428 U.S. 543, 554. As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularlized and objective justification.

Moreover, characterizing every street encounter between a citizen and the police as a "seizure," while not enhancing any interest secured by Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices. The Court has on other

> occasions referred to the acknowledged need for police questioning as a tool in the effective enforcement of the criminal laws. "Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished. Haynes v. Washington, 373 U.S. 503, 515," Schneckloth v. Bustamonte, 412 U.S. at 225. Id., at 553-554.

It is submitted that under all the circumstances the officer's action in putting his head in the open door was consistent with "diligently pursuing a means of investigating which is likely to resolve the matter one way or another very soon" (Michigan v. Summers, 452 U.S. 690-69, n.14 (quoting LaFave, Search and Seizure, §9.2, p.40 (1978)), and the moment of the intrusion constituted neither "search" nor "seizure."

B. The Court Below Failed To Consider The Second Prong Of The Test For Determining The Reasonableness Of A Warrentless Stop.

"[T]he reasonableness of a warrantless stop depends upon the scope of its intrusion as well as the need for its inception." Delaware v. Prouse, 440 U.S. 645, 648 (1975). See also Michigan v. Summers, supra at 701. The court below totally failed to consider the momentariness and minimality of the intrusion. As well he discussed below the scope of the intrusion is best considered in light of the privacy interest intruded upon.

III. NEITHER DEFENDANT HAD A LEGITIMATE EXPECTATION OF PRIVACY UNDER THE CIRCUMSTANCES OF THE CASE. THEREFORE NEITHER COULD CLAIM FOURTH AMENDMENT PROTECTIONS AND DEFENDANT PODGURSKI LACKED STANDING TO RAISE SUCH A CLAIM.

In assessing the scope or character

of the intrusion, it is suggested that the appropriate considerations are two-fold: whether the intrusion is reasonably related in scope to the investigation; that is "whether, based upon the whole picture" the officer, "could reasonbly surmise that the particular vehicle ... was engaged in criminal activity." (United States v. Cortez, 449 U.S. 411, 421-422 (1981)); and whether it intrudes into an area in which an individual has a legitimate expectation of privacy, not merely a subjective expectation of not being discovered. Rakas v. Illinois, 439 U.S. 128, 143, n.12 (1978).

Rakas provides the controlling analysis of a legitimate expectation of privacy. As acknowledged in Rakas, the court has long held that individuals have a lesser legitimate expectation of

privacy in motor vehicles than with respect to one's home. See also, United States v. Chadwick, 433 U.S. 1 (1977). Whether one has a legitimate or reasonable expectation of privacy in a motor vehicle is to be determined in light of all the surrounding circumstances. Here, the van was not parked upon property belonging to either defendant, rather it was parked upon property under the control of the complaining civilian - indeed its location led to the witness' observations of the activity going on inside the van and subsequent report of suspected illegal activity, i.e. "cutting up something they shouldn't be cutting."

A further critical factor in assessing the reasonableness of an expectation of privacy, is whether the

person invoking the Fourth Amendment protection took normal precautions to maintain privacy. For example, in Katz v. United States, 389 U.S. 347, 352 (1977), the defendant entered a phone booth and closed the door behind him; in South Dakota v. Opperman, 428 U.S. 364 (1976), doors of motor vehicle were locked and windows rolled up. However, in the instant case, the Supreme Judicial Court in holding that defendant Podgurski had a legitimate expectation of privacy, noted that the van was apparetly designed for minimal visual access, yet disregarded the crucial point, that the defendants opened the sliding door, thus inviting access. Under these circumstances, it is suggested that defendants waived whatever reasonable expectation of privacy they might have had regardless

of the number of windows in the van. Therefore, it is suggested the court incorrectly granted standing to Podgurski to raise a Fourth Amendment claim. Even if both defendants have standing to raise the claim, it is suggested, that when the very minor intrusion which occurred is measured against the diminished legitimate expectation of privacy occassioned by the opened door of the vehicle, the officer's conduct cannot but be deemed reasonable and held not to be violative of Fourth Amendment prohibitions.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the decision of the Supreme Judicial Court and to establish a reasonable standard for on-the-street investigations - a

standard consonant with a citizen's legitimate right to privacy and society's legitimate right to reasonable and effective law enforcement.

Respectfully submitted,

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